

THE HONORABLE BENJAMIN H. SETTLE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SHAMARICA D. SCOTT and LINDA A. WILSON, individually,

Plaintiffs,

1

THE EVERGREEN STATE COLLEGE; JENNIFER SCHOOLER, and DOES I through X, inclusive, employees of The Evergreen State College,

Defendants.

Case No. 3:17-cv-05823-BHS

**PLAINTIFF SHAMARICA SCOTT'S
MOTION TO COMPEL CR 30(b)(6)
DESIGNEE**

NOTE ON MOTION CALENDAR:
Friday, December 14, 2018

Without Oral Argument

I. RELIEF REQUESTED

Plaintiff ShaMarica D. Scott respectfully requests that the Court order Defendant The Evergreen State College (hereinafter “TESC”) to produce a CR 30(b)(6) designee for a supplemental deposition.

II. BRIEF RELEVANT BACKGROUND

On July 6, 2018, Plaintiff Scott served Defendant TESC with her Notice of CR 30(b)(6) Deposition of Defendant The Evergreen State College (hereinafter “Notice”). Declaration of Ada K. Wong (hereinafter “Wong Decl.”), ¶ 3, Ex. A. The Notice included descriptions of

1 various topics about which examination was requested, including topics on which Defendant
2 TESC failed to produce a designee, namely topic 11 and the latter part of topic 18¹:

3 11. All policies and requirements regarding athletic scholarships and/or tuition
4 waivers or reductions in effect from January 1, 2014 – December 31, 2016.

5 18. Jennifer Schooler's job duties, responsibilities, authority to disallow students
6 from playing on the Women's Basketball Team, and authority or ability to have any effect on
7 whether student athletes are granted an athletic scholarship or tuition waivers/reductions.

8 To accommodate the schedules of counsel and the witnesses, the deposition was
9 continued a couple times; the deposition finally occurred over two half-days on November 14
10 and 15, 2018. Wong Decl., ¶ 3. Originally, the CR 30(b)(6) deposition was scheduled for
11 November 15, 2018, but because one of Defendant TESC's lay witness's deposition was
12 scheduled for November 14, 2018, and Defendant wanted to designate said witness as a
13 corporate representative as well, Plaintiff Scott was happy to accommodate the lay witness and
14 conduct both her lay witness deposition and her portion of the CR 30(b)(6) deposition the same
15 day on November 14, 2018. *Id.* at ¶ 4. As such, the CR 30(b)(6) deposition resumed the
16 following morning on November 15, 2018. *Id.* at ¶ 5.

17 However, on the morning of November 15, 2018, defense counsel, Mr. El Shon
18 Richmond, *for the first time*, told Plaintiff's counsel, Mrs. Ada Wong, that Defendant TESC
19 was not designating any witnesses for topics 11 and 21. *Id.* at ¶ 6. Wong and Richmond
20 discussed this briefly before the deposition started, and again during the breaks, including why

21 ¹ Defendant TESC also, *for the first time* the day of the deposition, refused to designate a witness to testify to
22 topic no. 21, which relates to "All facts related to Defendants' affirmative defenses" and purports to list out
23 various affirmative defenses. However, Plaintiff Scott is not seeking to compel a designee at this time because
 Defendants have admitted that they do not have any witnesses to speak to these facts besides defense counsel
 himself, and to which Plaintiff Scott is simultaneously filing a Motion for Partial Summary Judgment on said
 affirmative defenses raised by Defendants.

it was the first time that Wong was hearing about this since the Notice was sent almost 4.5 months ago. *Id.* at ¶ 7. At the end of the deposition, although the designated representative was able to briefly discuss the former portion of topic 18, she had no knowledge of the latter portion of topic 18 (Jennifer Schooler's authority or ability to have any effect on whether student athletes are granted an athletic scholarship or tuition waivers/reductions). *Id.* at ¶ 11.

III. ISSUE PRESENTED

1. Whether the Court should order Defendant TESC to produce a CR 30(b)(6) designee for a supplemental deposition when Plaintiff Scott provided her list of topics almost 4.5 months prior to the deposition and when Defendant TESC failed to object or even bring up the issue of not producing a witness for particular topics until the morning of the deposition.

IV. EVIDENCE RELIED UPON

In support of this Motion, Plaintiff Scott relies upon the following:

1. The Declaration of Ada K. Wong and the attachments thereto; and
2. The files and pleadings herein.

V. AUTHORITY AND ARGUMENT

A. Plaintiff Scott Complied with Fed. R. Civ. P. 37(a)(1) and Can Move for an Order Compelling Designation of a Rule 30(b)(6) Representative

A party seeking discovery may move for an order compelling a designation if “a corporation or other entity fails to make a designation under Rule 30(b)(6).” Fed. R. Civ. P. 37(a)(3)(B)(i). When a party moves for an order compelling discovery “[t]he motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.” Fed. R. Civ. P. 37(a)(1).

1 As evidenced by the Declaration of Ada K. Wong attached in support of Plaintiff
2 Scott's underlying motion, the parties, through counsel, have met and conferred in good faith
3 on November 20, 2018 to resolve this discovery dispute short of resorting to Court
4 intervention. Wong. Decl., ¶¶ 15-17. However, to date, defense counsel has failed to produce
5 the requested designee necessitating a Court Order.

6 **B. Fed. R. Civ. P. 30(b)(6) Authorizes Parties to Depose an Entity Regarding Topics
7 Itemized in the Deposition Notice**

8 A party may, in her notice of deposition, "name as the deponent a public or private
9 corporation, a partnership, an association, a governmental agency, or other entity and must
10 describe with reasonable particularity the matters for examination." Fed. R. Civ. P. 30(b)(6).
11 "The named organization must then designate one or more offices, directors, or management
12 agents, or designate other persons who consent to testify on its behalf; and it may set out the
13 designated matters on which each person designated will testify." *Id.*

14 **C. The Entity Must Provide Knowledgeable Representative(s)**

15 An organization has a duty to prepare its representative to provide complete,
16 knowledgeable, and binding answers on its behalf. *Nevada Power Co. v. Monsanto Co.*, 891
17 F.Supp. 1406 (D.Nev. 1995); *U.S. v. Massachusetts Indus. Finance Agency*, 162 F.R.D. 410
18 (D.Mass. 1995). The designated representative must be able to testify with the full knowledge
19 of the organization concerning the subject matter and the organization may not limit the
20 testimony of the representative to the representative's personal knowledge. *Buycks-Roberson*
21 *v. Citibank Federal Sav. Bank*, 162 F.R.D. 388 (N.D.Ill. 1995). Once a requesting party
22 describes with reasonable particularity the matters on which the examination is requested, a
23 series of duties fall on the responding corporation. *Alexander v. Fed. Bureau of Investigation*,

1 186 F.R.D. 137, 139-41 (D.D.C. 1998). First, the responding party must designate a deponent
2 knowledgeable on the topic. *Id.* at 141. Second, the responding party must designate multiple
3 deponents if more than one is necessary to respond to all designated topics. *Id.* Third, the
4 responding corporation must prepare the deponent so that s/he can testify on matters both
5 within her/his personal knowledge as well as those reasonably known by the responding
6 entity.” *Id.*; *U.S. ex. rel Fago v. M&T Mort. Corp.*, 235 F.R.D. 11, 23 (D.D.C. 2006).

7 The corporation’s duty to prepare the designated deponent “beyond matters personally
8 known to the designee or to matters in which that designee was personally involved” indicates
9 that the deponent must investigate not just facts reasonably known to the corporation, but any
10 fact potentially relevant to the described topic known by any employee or agent of the
11 corporation. *Poole v. Textron, Inc.*, 192 F.R.D. 494, 504 (D.Md. 2000); *Wilson v. Lakner*, 228
12 F.R.D. 524, 528 (D.Md. 2005). The entity is not relieved of its obligation to produce a designee
13 to testify on behalf of the entity simply because the events are distant and no current employee
14 has a memory of the events. If the information is readily available from a documentary source,
15 the organization must prepare a representative to testify about distant events. *In re Honda Am.*
16 *Motor Co., Inc. Dealership Relations Litigation*, 168 F.R.D. 535 (D.Md. 1996). The
17 organization may also designate a former employee as its representative(s). *U.S. v. Taylor*,
18 166 F.R.D. 356, *affirmed* 166 F.R.D. 367 (M.D.N.C. 1996). A corporation has “a duty to make
19 a conscientious, good-faith effort to designate knowledgeable persons for Rule 30(b)(6)
20 depositions and to prepare them to fully and unequivocally answer questions about the designated
21 subject matter.” *Anderson v. Domino’s Pizza, Inc.*, --- F.Supp. 2d ---, 2012 WL 1684620 *4
22 (W.D.Wash. 2012) (quoting *Great Am. Ins. Co. of New York v. Vegas Const. Co., Inc.*, 251
23 F.R.D. 534, 538 (D.Nev. 2008)) (quotations and other citations omitted). A corporation is

1 obligated to produce one or more Rule 30(b)(6) witness who are thoroughly educated about
2 the noticed deposition topics and facts known to the corporation or its counsel. *See id.* (citing
3 *In re: Vitamins Antitrust Litigation*, 216 F.R.D. 168, 172 (D.D.C. 2003)).

4 Fed. R. Civ. P. 30(b)(6) requires a good faith effort on part of the entity to find out the
5 relevant facts – to collect information, review documents, and interview employees with
6 personal knowledge just as a corporate party is expected to do in answering interrogatories.
7 This interpretation is necessary in order to make the deposition a meaningful one and to prevent
8 the “sandbagging” of an opponent by conducting a half-hearted inquiry before the deposition,
9 but a thorough and vigorous one before trial or at the summary judgment stage. This would
10 completely defeat the purpose of the discovery process. *See Taylor*, 166 F.R.D. at 362.

11 **D. Defendant TESC’s Unreasonable and Untimely Refusal to Produce a Designee**

12 Here, Defendant TESC’s counsel failed to provide an appropriate designee for topics
13 11 and 18 as outlined above. This was first brought to Plaintiff Scott’s counsel’s attention *the*
14 *second morning of* the deposition on November 15, 2018. The Notice, which included these
15 very topics, was served on Defendants on July 6, 2018. Defendant TESC had almost 4.5
16 months to object or seek a protective order – or simply communicate with Plaintiff Scott’s
17 counsel regarding their position. However, Defendant TESC did not do any of this and instead
18 waited until the last possible minute to tell Plaintiff’s counsel Wong that there are not
19 designating any representative to testify regarding topics 11 and 18. For efficiency and cost-
20 effectiveness sake, once Wong was advised of this at the start of the second day of the CR
21 30(b)(6) deposition, she spoke with Richmond regarding the untimeliness of this refusal and
22 requested that he communicate with his client before the deposition is over to see if they are
23 willing to produce a representative to speak on this topic that day. Wong Decl., ¶ 8. Richmond

1 stated that he will think about it and may talk to his client during a break. *Id.* at ¶ 9. During
2 the breaks, Wong continued to press Richmond to speak with his client, so the deposition can
3 conclude that day. *Id.* at ¶ 10. Unfortunately, Defendant TESC's final determination was that
4 it was not going to produce a designee for the remaining topics. Wong then requested to meet
5 and confer with Richmond regarding this issue (among other issues) and counsel agreed to
6 hold the conference on November 20, 2018. *Id.* at ¶ 12.

7 If a party believes that any discovery request is improper, it is incumbent upon that
8 party to seek a protective order. Fed. R. Civ. P. 26(c). This includes limiting the scope of
9 discovery; and these rules apply to any discovery request, including 30(b)(6) depositions. Fed.
10 R. Civ. P. 37(d); *Bregman v. Dist. of Columbia*, 182 F.R.D. 352, 355 (D.D.C. 1998); *EEOC v.*
11 *Thurston Motor Lines, Inc.*, 124 F.R.D. 62, 67 (D.P.R. 1981).

12 Defendant TESC had nearly 4.5 months to raise any issue with the Notice and/or inform
13 Plaintiff Scott that it was not going to designate a representative for any of the topics outlined
14 in the original Notice. If no one at TESC was able to provide testimony regarding these topics,
15 it should have sought a protective order – though Plaintiff Scott doubts the validity of
16 Defendant's position because TESC offers athletic scholarships, tuition waivers, and/or tuition
17 reductions, and TESC should know how these decisions are made and whether a Head Coach
18 has any authority or ability over these decisions.

19 In addition to the questionable timing of raising the issue for the first time the second
20 morning of the deposition, Defendant TESC's more detailed objection was raised *after* the CR
21 30(b)(6) deposition concluded, specifically, that Defendant TESC was concerned about the
22 relevance and pertinence of the time frame (which Defendant TESC contends should be limited
23 to when Defendant Schooler was the Head Coach and made decisions regarding Plaintiff

1 Scott's tuition waiver). Wong Decl., ¶ 13. Defense counsel also stated that Plaintiff Scott can
2 use a brief portion of one of an upcoming lay witness's deposition to explore whether she has
3 knowledge of this topic and can ask her questions in her lay witness capacity if she has such
4 knowledge. *Id.* at ¶ 14.

5 During the November 20, 2018 conference, Wong advised Richmond that Plaintiff
6 Scott was willing to limit the policies and requirements as outlined in the Notice's outstanding
7 topics to the Women's Basketball Team at TESC. *Id.* at ¶ 15. The parties were unable to agree
8 on a timeframe. *Id.* at ¶ 16. Moreover, Plaintiff Scott is seeking sworn testimony not from
9 any particular individual, but from the corporate defendant itself. Defendant TESC has, on
10 numerous occasions, stated that topics that were covered in previous depositions by lay
11 witnesses should not be covered again in a CR 30(b)(6) deposition for efficiency. *Id.* at ¶ 17.
12 However, it is Plaintiff Scott's right under the Federal Rules of Civil Procedure to seek sworn
13 testimony from an entity – here, TESC – not from a lay witness whose testimony would not be
14 binding on Defendant TESC. *See* Fed. R. Civ. P. 30(b)(6) and 37(b)(2); *Taylor*, 166 F.R.D. at
15 361 (“The corporation must provide its interpretation of documents and events.”). Testimony
16 from current or former company employees in their individual capacities does not bind the
17 corporation and does not provide Plaintiff Scott with meaningful information about TESC's
18 position on various areas of inquiry or its policies and procedures. *See, e.g.*, *CFTC v. Noble*
19 *Metals Int'l, Inc.*, 67 F.3d 766, 771 (9th Cir. 1995); *Calzaturificio S.C.A.R.P.A. v. Fabiano*
20 *Shoe Co., Inc.*, 201 F.R.D. 33, 37 (D.Mass. 2001). Thus, Defendant TESC's argument that
21 Plaintiff Scott has the answers she needs from TESC through individual depositions is without
22 foundation in law or fact, and should be rejected.

1 **E. Sanctions are Appropriate if the Entity Fails to Provide Informed/Knowledgeable**
2 **Representative(s)**

3 Courts understandably must guard against the gamesmanship of an entity avoiding
4 deposition topics by not designating an agent to testify regarding topics as outlined in the
5 requesting party's Notice – especially when the Notice was provided almost 4.5 months before
6 the deposition was held. To the extent that a designee is not responsive to a notice of deposition
7 – claiming no or limited knowledge – the responding party may be subject to sanctions. *See,*
8 *e.g.*, *Taylor*, 166 F.R.D. at 363. This is particularly true where a more knowledgeable witness
9 might have been produced. *See Resolution Trust Corp. v. Southern Union Co.*, 985 F.2d 196
10 (5th Cir. 1993). However, even despite a forthcoming witness, if unanswered information is
11 significant enough, the CR 30(b)(6) deposition may have to be reconvened, possibly with a
12 new witness, and attorney's fees and costs awarded. *See Resolution Trust Corp.*, 985 F.2d at
13 197; *Marker v. Union Fid. Life Ins. Co.*, 125 F.R.D 121, 126 (M.D.N.C. 1989). Where conduct
14 is willful, imposition of attorney's fees and costs is inadequate, and stronger sanctions must be
15 meted out.

16 As the court in *Noble Metals* stated, “Had [defendants] truly been unable to designate
17 a representative, they could have sought a protective order. . . . By eschewing any application
18 for such an order, and instead declining to make an appropriate designation of someone to
19 testify, [defendants] engaged in a calculated course of conduct.” 67 F.3d at 771 (citations
20 omitted).

21 Here, Defendant TESC deliberately waited until the *morning of* the second day of the
22 deposition to notify Plaintiff that it was not going to designate a witness to testify to a few of
23 the topics outlined in the Notice. It had more than ample time and opportunity to bring this

1 issue to Plaintiff's attention, but Defendant choose not to. As such, Plaintiff Scott's motion to
2 compel supplemental testimony is both proper and reasonable in light of Defendant TESC's
3 refusal to comply with the rules of civil procedure and its failure to provide complete,
4 knowledgeable, and binding testimony responsive to Plaintiff Scott's Notice, topics 11 and 18.
5 Moreover, Defendant TESC's untimely assertion that there is no one who at TESC who can
6 speak on these topics is disingenuous at best, and TESC's instruction for Plaintiff Scott to ask
7 an upcoming lay witnesses regarding her potential knowledge on these topics is a delay tactic
8 that is unlikely to yield any true response, and definitely not binding testimony on TESC.
9 Defendant TESC has also made no showing that it made any good faith attempt to designate a
10 representative who could give testimony responsive to topics 11 and 18.

11 TESC's failure to raise any issues regarding the scope of the topics or the availability
12 of a knowledgeable designee before the deposition occurred renders Defendant TESC's
13 arguments and objections moot. Whatever issues or objections Defendant TESC had could
14 have easily been addressed in the almost 4.5 months between the Notice and deposition. *See,*
15 *e.g., Prokosch v. Catalina Lighting, Inc.,* 193 F.R.D. 633, 639 (D.Minn. 2000).

16 Plaintiff Scott is not asking for a specific amount for sanctions at this time and defers
17 to what the Court may deem fit given the circumstances and Defendant TESC's conduct.
18 However, Plaintiff Scott is specifically requesting that should this Court compel Defendant
19 TESC to attend a supplemental deposition, that TESC bear the attorney's fees and costs for
20 bringing this motion and its reply, mileage and parking reimbursement, if any, and court
21 reporter's fees and costs.

22 **F. Timing of Supplemental Deposition**

23

Timing is a serious concern because the discovery cutoff is December 21, 2019, and the trial is scheduled for February 26, 2019. Plaintiff Scott also anticipates Defendants filing a motion for summary judgment on November 29, 2018. Plaintiff Scott respectfully requests this court to compel Defendant TESC to provide a knowledgeable designee for topics 11 and 18, as outlined in Plaintiff Scott's Notice, between January 7, 2019 and January 18, 2019, to occur at Plaintiff Scott's counsel's office.²

VI. CONCLUSION

For the foregoing reasons, Plaintiff Scott respectfully requests that Defendant TESC be compelled to prepare and produce a corporate designee for further deposition on topics 11 and 18 as identified in her Notice of Deposition, with all attorney's fees and costs associated with this motion and the supplemental deposition to be paid for by Defendant TESC.

VII. PROPOSED ORDER

A proposed order seeking the relief requested is attached.

DATED November 29, 2018.

AKW LAW, P.C.

/s/ Ada K. Wong

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² Of course, Plaintiff Scott prefers the supplemental deposition to take place as early as possible after the noted hearing date of December 14, 2018, but Plaintiff Scott understands that an Order may not be issued that same day, and Plaintiff's counsel will be out of state (and has filed her Notice of Unavailability on November 9, 2018), and has also taken into account the upcoming holidays that may impact the availability of defense counsel and witness(es). *See* Dkt. #37 (Second Amended Notice of Unavailability of Wong).

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On November 29, 2018, I caused a copy of the foregoing **PLAINTIFF SHAMARICA SCOTT'S MOTION TO COMPEL CR 30(b)(6) DESIGNEE** to be served on the parties listed below in the manner specified below:

El Shon D. Richmond Janay Ferguson Suzanne LiaBraaten ATTORNEY GENERAL OF WASHINGTON / Torts Division 7141 Cleanwater Drive SW P.O. Box 40126 Olympia, WA 98504 Elshonr@atg.wa.gov JanayF@atg.wa.gov stefanyl@atg.wa.gov daniellew@atg.wa.gov TOROlyEF@atg.wa.gov maritzao@atg.wa.gov Attorneys for Defendants	<input type="checkbox"/>	VIA FACSIMILE
	<input type="checkbox"/>	VIA FIRST CLASS U.S. MAIL
	<input type="checkbox"/>	VIA MESSENGER/HAND DELIVERY
	<input checked="" type="checkbox"/>	VIA E-MAIL/E-FILE <i>Per 1/17/18 Stipulation</i> <i>Regarding Electronic Service</i> <i>Pursuant to Fed. R. Civ. P. 5</i>
Linda A. Wilson 2504 17 th Ave NW Olympia, WA 98502 <i>Plaintiff</i>	<input type="checkbox"/>	VIA FACSIMILE
	<input checked="" type="checkbox"/>	VIA FIRST CLASS U.S. MAIL
	<input type="checkbox"/>	VIA MESSENGER/HAND DELIVERY
	<input checked="" type="checkbox"/>	VIA E-MAIL/E-FILE

Dated this 29th day of November, 2018, at Mountlake Terrace, Washington.

/s/ Kaila A. Eckert

Kaila A. Eckert, Paralegal